COURT OF APPEALS
DECISION
DATED AND FILED

January 8, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3447

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

HARRISON M. MARCUM,

PLAINTIFF-APPELLANT,

V.

DONALD GUDMANSON, ANA SECCHI, PETER ERICKSEN, KELLY MUESKE, JIM MESSING, JOY NELSON,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Reversed and cause remanded.*

Before Eich, C.J., Dykman, P.J., and Roggensack, J.

PER CURIAM. Harrison Marcum appeals from an order dismissing his complaint against certain prison employees. We conclude that the order must be affirmed as to Marcum's state claims, but reversed as to any federal claims.

Marcum's complaint alleged that the defendants played various roles in transferring him to "R-Building" and certain programs in violation of his constitutional rights. As a result of this transfer, Marcum's confinement has become more structured and restricted. He requested injunctive relief prohibiting his continued "unconstitutional punishment," and monetary damages for loss of wages, pain and suffering, and "mental cruelty."

The circuit court dismissed the complaint. The order contained no analysis, but concluded that the defendants "accurately state the facts and applicable law." It appears the case was decided on briefs, without oral argument. The defendants' brief argued that Marcum failed to exhaust his remedies under the inmate complaint review system (ICRS) provided in WIS. ADM. CODE ch. DOC 310, and that federal and state statutes prohibit the filing of this suit before the plaintiff has exhausted his administrative remedies. Marcum appeals.

Marcum argues that he has exhausted his administrative remedies. Under ICRS an inmate first files a complaint with the inmate complaint investigator. WIS. ADM. CODE § DOC 310.025(1). If the superintendent responds to the complaint adversely, the inmate "may" appeal "by filing a written request for review" with the corrections complaint examiner. WIS. ADM. CODE § DOC 310.09(1). Marcum filed an ICRS complaint but never appealed the adverse decision he received. Marcum contends that an appeal to the corrections complaint examiner is not required to exhaust his administrative remedies because the rule provides only that an inmate "may" seek such an appeal, not that the inmate "shall" do so. We reject this argument. The rule uses "may" because inmates are not required to appeal from adverse decisions; they are free to drop the matter entirely. However, inmates who do not exhaust all the available

administrative review procedures may find that they are barred from pursuing the matter through the courts.

Alternatively, Marcum argues that he took the actions which are required to obtain review by the corrections complaint examiner. The question on appeal is whether there is a dispute of material fact on this point. Although the defendants captioned their motion as one to dismiss, it included matters outside the pleadings which were not excluded by the trial court, and therefore the motion was converted to one for summary judgment. *See* § 802.06(3), STATS. Summary judgment methodology is well established and need not be repeated here. *See* ***Grams v. Boss,*** 97 Wis.2d 332, 338-39, 294 N.W.2d 473, 476-77 (1980).

Marcum's complaint alleged that "the plaintiffs [sic] complaint through the I.C.R.S. was unsuccessful." While Marcum's pleadings were sufficient to allege exhaustion of administrative remedies, the defendants filed an affidavit by Charles Miller which stated that he is a corrections complaint examiner, that he "searched all records maintained on inmate complaints" under WIS. ADM. CODE ch. DOC 310, and that he has not found a request for review by Marcum. Marcum filed an unnotarized "affidavit" in response which stated that he mailed a request for review to the corrections complaint examiner.

The request for review must be *filed* with the complaint examiner. *See* WIS. ADM. CODE § DOC 310.09(1). In other words, the examiner must actually receive the request for review. Marcum's statement that he mailed a request for review does not controvert Miller's claim that no request was filed. Even if Marcum mailed his request timely, the examiner may not have received it. The examiner is required to acknowledge a request for review within five days of receipt to protect inmates from a request being lost in the mail. *See* WIS. ADM.

CODE § DOC 310.09(4). Marcum never stated in his affidavit whether he received an acknowledgment from the examiner. Because Marcum's affidavit does not rebut Miller's affidavit that no request for review was *filed*, we conclude that no dispute of material fact exists as to whether Marcum exhausted his administrative remedies before filing this action; he did not.

Marcum also argues that after filing this lawsuit, he refiled his complaint with ICRS and has exhausted his administrative remedies for that complaint. However, these events are not of record in this appeal, and we do not consider them further.

We next consider the legal effect of Marcum's failure to exhaust his administrative remedies. We separate this issue into state claims and federal claims. To the extent Marcum's complaint is construed as making claims under state law, it must be dismissed pursuant to § 801.02(7), STATS. That statute provides: "No prisoner … may commence a civil action … against an … employe … of the department of corrections in his or her official capacity or as an individual for acts … committed while carrying out his or her duties …, until the [prisoner] has exhausted any administrative remedies that the department has … promulgated by rule." The statute was effective on July 29, 1995. *See* 1995 Wis. Act 27, § 9310(3x). The acts described in Marcum's complaint began after that date, in December 1995. He did not exhaust the administrative remedies the department has promulgated as required by statute, and therefore any state claims must be dismissed.

Marcum argues that, to the extent he is making federal claims under 42 U.S.C. § 1983, the case law holds that he need not exhaust his administrative remedies before bringing suit. The defendants appear to concede that his

description of case law is accurate. Rather than disputing that description, they rely on 42 U.S.C. § 1997e(a), which provides: "No action shall be brought with respect to prison conditions under … [§ 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."

The defendants note that this language was enacted on April 26, 1996. Marcum filed his complaint in circuit court three days before that date. The Sixth Circuit has held that this new exhaustion requirement does not apply to cases filed before April 26, 1996. *See* ***Wright v. Morris***, 111 F.3d 414 (6th Cir.), *cert. denied,* 118 S.Ct. 263 (1997). No other circuit appears to have held to the contrary. The defendants offer no other grounds for dismissing Marcum's federal claims. Therefore, we conclude that 42 U.S.C. § 1997e(a) does not apply to Marcum's complaint, and the order dismissing the complaint must be reversed.

By the Court.—Order reversed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.